CORAMAS SDN. BHD.

v.

RAKYAT FIRST MERCHANT BANKERS BHD. & ANOR.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HARUN BIN MAHMUD HASHIM SCJ,
TAN SRI DATUK EDGAR JOSEPH JR. SCJ,
DATO' LIM BENG CHOON J.
[CIVIL APPEAL NO. 02-117 OF 1992]
3 JANUARY 1994

CONTRACT: Sale of shares - Agreement subject to prior approval of Bank Negara and Finance Minister - Whether failure to obtain approval rendered agreement void or unenforceable.

STATUTORY INTERPRETATION: Construction - Determined upon the actual words used - Read not in vacuo but as occurring in a single complex statute - Section 45(i) and s. 125 Banking and Financial Institutions Act 1989.

By an alleged oral agreement confirmed by a letter dated 14 December 1989 the 1st defendant had agreed to sell and the plaintiff had agreed to purchase 7.8 million shares in Kesang Corporation (Kesang) at a price of RM21.06 million. Pursuant to the proposed sale and purchase transaction, the 2nd defendant delivered the first trench of 5 million shares to the stakeholders within the stipulated time who in turn made payment in respect thereof by two cheques to the 1st defendant. However the 1st defendant never presented the two cheques for payment because it was at this juncture that it considered that prior written consent of the Minister of Finance under s. 45(1) of the Banking and Financial Institutions Act 1989 (the Act) had to be but was not obtained.

Both the plaintiff and 1st defendant applied for approval, but the applications were rejected. This led to the 1st defendant repudiating the alleged agreement.

Held:

[1] It follows that the mere fact that an argeement or arrangement is in contravention of s. 45(1) of the Act, is not by itself alone enough to render the same void; to be so, there must be some other provision in the Act, which has that effect.

[2] Neither defendant being a person which carried on a scheduled business, the applicable effective date, for purpose of the present case, would be 1 October 1989, and as the alleged agreement had been entered into after that date, that is to say, on 14 December 1989, it was not open to the plaintiff to rely on the saving provisions of s. 48(1). But that is not all, because by providing a saving provision in respect of acquisitions or disposals or holdings before the effective date, s. 48(1) necessarily implies that in respect of such transactions as are carried out on or after the effective date which offends s. 45, the same would thereby be rendered illegal and invalid.

[3] The Act does not in terms say that an agreement or arrangement in direct contravention of it is to be void. On the contrary, it provides by s. 125, a saving provision which says that except as otherwise provided in the Act, no contract or agreement or arrangement, in contravention of any provision of the Act, shall be void solely by reason of such contravention.

[Appeal dismissed with costs].

[Bahasa Malaysia Translation of Headnote]

KONTRAK: Jualan saham-saham - Perjanjian tertakluk kepada kelulusan terlebih dahulu oleh Bank Negara dan Menteri Kewangan - Sama ada kegagalan untuk mendapatkan kelulusan menjadikan perjanjian terbatal dan tidak boleh dikuatkuasakan.

PENTAFSIRAN STATUT: Pentakrifan - Diputuskan atas perkataan-perkataan sebenar yang digunakan - Tidak dibaca in vacuo tetapi sebagai berlaku dalam satu statut yang kompleks - Seksyen 45(i) dan s. 125 Akta Bank dan Institusi Kewangan 1989.

Melalui satu perjanjian lisan yang disahkan melalui sepucuk surat bertarikh 14 Disember 1989 defendan pertama telah bersetuju untuk menjual dan plaintif telah bersetuju untuk membeli 7.8 juta saham dalam Kesang Corporation (Kesang) pada harga RM21.06 juta. Menurut cadangan transaksi surat perjanjian jual-beli, defendan kedua telah menghantarserah bahagian pertama berjumlah 5 juta saham kepada penyimpan wang pertaruhan dalam masa yang ditetapkan yang mana kemudiannya membuat bayaran berkenaan dengannya itu melalui dua keping cek kepada defendan pertama. Walau bagaimanapun, defendan pertama tidak mengemukakan kedua-dua keping cek tersebut

untuk pembayaran kerana pada peringkat ini ia menimbangkan bahawa kebenaran bertulis oleh Menteri Kewangan di bawah s. 45(1) Akta Bank dan Institusi Kewangan 1989 (Akta tersebut) perlu diperolehi terlebih dahulu, tetapi tidak diperolehi.

Kedua-dua plaintif dan defendan pertama memohon untuk kelulusan, tetapi telah ditolak. Ini membuatkan defendan pertama menolak perjanjian yang dikatakan itu.

Diputuskan:

[1] Fakta bahawa sesuatu penghujahan atau perjanjian adalah bertentangan dengan s. 45(1) Akta tersebut semata-mata, tidak boleh dengan sendirinya membuatkan perjanjian berkenaan sebagai tidak sah. Sebaliknya, mestilah terdapat peruntukan lain dalam Akta tersebut yang mempunyai kesan sebegitu.

[2] Oleh kerana kedua-dua defendan tidak menjalankan perniagaan terjadual, tarikh berkuatkuasa yang terpakai, bagi tujuan kes ini, ialah 1 Oktober 1989, dan memandangkan perjanjian yang dikatakan itu telah ditandatangani selepas tarikh tersebut, iaitu pada 14 Disember 1989, plaintif tidak boleh bergantung kepada peruntukan yang bersifat penyelamat iaitu s. 48(1). Tetapi bukan itu sahaja, kerana dengan memperuntukkan suatu peruntukan bersifat penyelamat berhubung dengan pemerolehan atau pelupusan atau pemegangan sebelum tarikh berkuatkuasa tersebut, s. 49(1) dengan wajarnya menyifatkan bahawa berhubung dengan transaksi yang dijalankan pada atau selepas tarikh berkuatkuasa tersebut yang melanggar s. 45, ia akan disifatkan menyalahi undang-undang dan sebagai tidak sah.

[3] Dari segi termanya Akta tersebut tidak menyebutkan sesuatu perjanjian atau pengaturan yang bertentangan dengannya sebagai terbatal. Sebaliknya, ia memperuntukkan melalui s. 125, suatu peruntukan yang bersifat penyelamat yang menyebutkan bahawa melainkan diperuntukkan sebaliknya dalam Akta tersebut, tiada kontrak atau perjanjian atau pengaturan, yang melanggar mana-mana syarat Akta tersebut, sebagai terbatal semata-mata atas sebab pelanggaran tersebut.

[Rayuan ditolak dengan kos].

Cases referred to:

R.V. & Co. v. Hindu Religious Endowment Board, AIR [1940] Md. 10, 11 ***(cit)***

Madho Singh v. James Skinner, AIR [1942] Lahore 243, 248 ***(cit)***

Gaya Prasad v. Kalapnath, AIR [1929] Oudh 389, 392 ***(cit)***

E.I.R. v. Jotrram Chandrabhan, AIR [1928] Lahore 162, 163 ***(cit)***

Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor. [1990] 1 CLJ 675 / [1990] 1 MLJ 356 ***(dist)***

Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd. [1978] 139 CLR 410 ***(cit)***

Babiah v. Mohammed Abdus Subhan [1954] A. Hyd. 156 (F.B.) ***(cit)***

Fakirchand v. Bensilal [1955] A. Hyd. 28 (F.B.) ***(cit)***

Bhashayya v. Chinnapareddi [1960] AAP 39 ***(cit)***

George v. Greater Adelaide Land Development Co. Ltd. [1929] 43 CLR 91 ***(cit)***

Melliss v. Shirley Local Board, 16 QBD 451 ***(cit)***

Legislation referred to:

Banking and Financial Institutions Act 1989, ss. 1, 2(1), 45(1) & (2), 48(1), 54(1)(a), (3), (4), (6), (7), (8), (11), 103(1), 125

Companies Act 1965, s. 6A(4)(c)

Contracts Act 1950, s. 24

Town Planning and Development Act 1920, s. 23 (S.A)

Other sources referred to:

Principles of Contract, Pollock, 10th Edn., p. 233

For the appellant - K.S. Narayanan; M/s. K.S. Narayanan & Associates

For the respondent - Porres Royan (Karen Kaur with him); M/s. Shook Lin & Bok

JUDGMENT

Edgar Joseph Jr. SCJ:

The facts which gave rise to the dispute which resulted in the litigation in the High Court (Commercial Division), Kuala Lumpur, and which in turn led to this appeal are simple and may be stated shortly. But, before we proceed to do so, we wish to say at the outset, that in this judgment, unless the context otherwise requires, it would be more convenient to refer to the appellant Coramas Sdn. Bhd., the first respondent Rakyat Merchant Bankers Bhd., and the second respondent Rakyat First Nominees Sdn. Bhd., as the plaintiff, the first defendant and the second defendant, respectively.

By an alleged oral agreement confirmed by a letter dated 14 December 1989 signed by the Managing Director of the plaintiff, Mr. Patrick Lim Hong Koon, addressed to the first defendant, the latter had agreed to sell and the

plaintiff had agreed to purchase 7.8 million shares in Kesang Corporation ("Kesang") at a price of RM2.70 per share amounting to RM21.06 million. The terms of that letter were as follows:

> 14 December 1989
>
> Rakyat First Merchant Bankers Berhad,
> 9th Floor, Bangunan Angkasa Raya,
> Jalan Ampang, 50450 Kuala Lumpur.
>
> Attention: Ms. Yong Siew Kat
>
> Dear Ms.
>
> Re: 7,800,000 Shares In Kesang Corporation Bhd.
>
> I refer to the telephone conversation with your Ms. Yong Siew Kat this morning.
>
> This is to confirm that we have agreed to purchase from you 7.8 million shares in the above company at the price of RM2.70 per share totalling RM21.06 million.
>
> As agreed we shall jointly appoint a firm of solicitors to take delivery of the shares from you and to arrange for payment by them to you thereafter.
>
> Thank you.
>
> Yours faithfully
> Coramas Sdn. Bhd.
>
> Patrick Lim Hong Koon
> Managing Director

A consortium of lenders managed by the first defendant had then extended a term loan/stand by credit of RM36,000,000 to an incorporated company known as Safuan Holdings Sdn. Bhd. ("Safuan") upon the security, *inter alia,* of a pledge of 7.8 million shares ("the shares") in a publicly listed company known as Kesang Corporation Bhd. ("Kesang"), registered in the name of the second defendant. Safuan having made default in the repayment of the loan, the consortium of lenders had decided to enforce the security by sale of the shares.

Accordingly, by an alleged oral agreement confirmed by a letter dated 14 December 1989, signed by the Managing Director of the plaintiff Mr. Patrick Lim Hong Koon addressed to the first defendant, the first defendant on behalf of the lenders had agreed to sell to the plaintiffs and the plaintiffs had agreed to purchase the shares at a price of RM2.70 per share amounting to RM21.06 million. For brevity and convenience we shall refer to this transaction as "the proposed sale and purchase transaction".

At first, payment of the purchase price was to have been effected in full by a single payment but later this term of the alleged agreement was varied by mutual consent the effect of which was that the legal firm of Mah Kok & Din were to act as stakeholders, that the plaintiff would take delivery of the shares from the shareholders in two trenches of 5 million and 2.8 million respectively, upon payment by way of cashier's orders of the sums of RM13.5 million and RM7,560 million, in respect of each trench.

It was common ground that the plaintiff's intention in embarking upon this proposed transaction was to re-sell the shares to a third party, namely, Aeroway Sdn. Bhd. ("Aeroway"), at a profit, that is to say, at a price of RM3.10 per share and it was from the expected proceeds of this re-sale that the plaintiff had expected to settle the amount payable under its alleged agreement with the first defendant.

Be that as it may, pursuant to the proposed sale and purchase transaction, the second defendant delivered the first trench of 5 million shares to the stakeholders within the stipulated time who in turn made payment in respect thereof by two cheques of RM13.5 million and RM7,560 million, respectively, to the first defendant.

However, the first defendant never presented the two cheques for payment because it was at this juncture that it considered that prior written consent of the Minister for Finance under s. 45(1) of the Banking and Financial Institutions Act 1989, ("the Act") had to be but was not obtained.

Section 45(1) provides:

> 45.(1) Without prejudice to ss. 49 and 50, and subject to s. 46, no person shall enter into an agreement or arrangement to acquire or dispose any interest in the shares of a licensed local institution by which, if the agreement or arrangement is carried out, he would -
>
> (a) acquire, together with any interests in the shares of that institution which were then already held by him, or by him and by persons acting in concert with him; or
>
> (b) dispose, together with the interests in shares previously disposed by him to any single person or any persons acting in concert, to such single person or such persons acting in concert.
>
> an aggregate interest in shares of not less than five per centum of the shares of that

institution, without obtaining the prior written approval of the Minister to enter into such agreement or arrangement:

Provided that no such approval shall be granted in respect of any acquisition or disposal which would result in a contravention of s. 46.

In consequence, both the plaintiff and the first defendant had applied formally by letters dated 29 December 1989 and 28 December 1989, respectively, to Bank Negara for written consent under s. 45(1), but both applications were rejected by separate letters each dated 28 February 1990.

This led to the first defendant repudiating the alleged agreement which in turn led to the plaintiff issuing a writ for damages both general and liquidated, as well as other reliefs, for breach of contract, against both the defendants it being alleged that the written consent of the Minister of Finance under s. 45(1) was not required for the proposed sale and purchase transaction.

At the outset of the hearing before Madam Justice Siti Norma the following preliminary points of Law were argued.

1. Whether the purported contract dated 14 December 1989, between the plaintiff and the defendants for the purchase of the 7.8 million shares in Kesang Corporation Bhd. was subject to both the plaintiff and the defendants successfully obtaining the prior written approval of Bank Negara Malaysia and of the Minister of Finance pursuant to s. 45 of the Act.
2. Whether the plaintiff's failure to successfully obtain the prior written approval of Bank Negara and/or the Minister of Finance renders the said contract to purchase the 7.8 million shares in Kesang Corporation Berhad in any way void or unenforceable.
3. Whether the purported contract dated 14 December 1989, was in any event rendered void and unenforceable by reason of the letter dated 28 February 1990, from Bank Negara Malaysia to the defendants informing the defendants that their proposal to sell the 7.8 million shares in Kesang Corporation Bhd. to the plaintiff was not approved.

After hearing full arguments, her Ladyship answered all three questions in the affirmative, that is to say, in favour of the defendants, though she did not dismiss the suit. From that decision the plaintiffs had appealed to this Court.

At all material times, the issued share capital of Kesang was RM23,649,946 divided into 23,649,946 ordinary shares of RM1 each, the subject matter of the proposed sale and purchase transaction which, of course, meant that the shares constituted 32.98% of the issued share capital of Kesang.

At all material times, the issued share capital of KCB Finance Berhad was RM 5,500,000 divided into 5,500,0080 ordinary shares of RM1 each and of these shares, Kesang was the registered shareholder of 962,500 ordinary shares which, of course, meant that Kesang's shareholding in KCB Finance constituted 17.5% of the latter's issued share capital.

Now, by reason of s. 45(1) and (2) and s. 2(1) of the Act, "interest in a share" has to be construed having regard to subsections (2) to (10) of s. 6A of the Companies Act 1965. More particularly, the applicable provision in the context of the facts of the present appeal, is subsection (4)(c) of s. 6A which reads as follows:

6A.(4) A person shall be deemed to have an interest in a share where a body corporate has an interest in a share and -

(c) that person, or the associates of that person or that person and his associates are entitled to exercise or control the exercise of not less than fifteen per centum of the votes attached to the voting shares in the body corporate.

It follows, therefore, that the first defendant is deemed to have an interest in the shares of KCB Finance (a licensed local institution) by reason of the fact that Kesang had a direct 17.5% interest in the shares of KCB Finance Bhd. and so the first defendant would be entitled to exercise 32.98% (or in other words, not less than 15%) of the votes attached to the voting shares of Kesang.

The defendants contended that the effect of s. 45(1) is that the prior written approval of the Minister of Finance was required before a person in the position of the plaintiff can enter into such an agreement or arrangement as had been entered into here, and that when, as here, there

had been an omission to comply with that essential formality, the plaintiff lacked the capacity to enter into such agreement or arrangement. In the result, the alleged agreement was void and unenforceable - so it was said.

On the other hand, the argument per contra, advanced by Counsel for the plaintiff was that s. 125 of the Act saved the alleged agreement from being void and unenforceable notwithstanding a breach of s. 45(1).

Section 125 provides:

> 125. Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in contravention of any provision of this Act shall be void solely be reason of such contravention:
>
> Provided that nothing contained in this section shall affect any criminal liability of any person for an offence under this Act in respect of such contravention.

It was argued that neither s. 45 nor any other section in the Act declares that an agreement in contravention of s. 45(1) is void.

The issue, therefore, appeared to us to be purely and simply one of construction, and in the ultimate resort, must be determined upon the actual words used in ss. 45(1) and 125, read not *in vacuo* but as occurring in a single complex statute, in which one part may throw light upon another.

First of all, there are certain preliminary observations we should like to make regarding s. 125.

According to s. 125, no contract etc., entered into in contravention of any provision of the Act shall be void solely by reason of such contravention. But there is an exception engrafted on this section as is clear from the opening words of the section, namely, "Except as otherwise provided in this Act or in pursuance of any provision of this Act", when such a contract etc. would be void by reason of some **other provision** of the Act. To put it another way, by s. 125 a general intention is expressed that no contract etc., entered into in contravention of the Act shall be void solely by reason of such contravention, but it expresses also a particular intention, incompatible with the general intention indicated by the opening words aforesaid which words are to be regarded as being in the nature of an exception. (*R.V. & Co. v. Hindu Religious Endowment Board*, AIR [1940] Md. 10, 11). An exception must be construed strictly (*Madho Singh v. James Skinner*, AIR [1942] Lahore 243, 248) and should not be allowed to affect the general rule. It must be confined within its own limits and strictly to the subject matter embraced within it and it should not be extended by analogy to include cases not reasonably within the perview of the language employed. (See *Gaya Prasad v. Kalapnath*, AIR [1929] Oudh 389, 392). Also, exceptions are to be taken most strongly against the party for whose benefit they are introduced. (See *E.I.R. v. Jotrram Chandrabhan*, AIR [1928] Lahore 162, 163). The enumeration of exceptions to a general rule would exclude, by necessary implication, all other exceptions.

However, the wording of the exception occurring in s. 125 is merely descriptive and does not say when such contract, agreement or arrangement entered into in contravention of the Act would be void. To answer that question, we have to look for some other provision of the Act which has that effect.

So, what it comes to is this: the Act does not in terms say that an agreement or arrangement in direct contravention of it is to be void. On the contrary, it provides by s. 125, a saving provision which says that except as otherwise provided in the Act, no contract or agreement or arrangement, in contravention of any provision of the Act, shall be void solely by reason of such contravention.

With respect, this is a point which the Judge in the Court below, did not appreciate, as is apparent from the following passage in her judgment (p. 18 para 2):

> In this case, neither the plaintiff nor the 1st defendant had the capacity to enter into the proposed contract as at 14 December 1989, and without the prior written approval, there is no agreement which can be saved by s. 125. My conclusion is borne out by the first four words of that section, "Except as otherwise provided". Since the Act has not expressly provided that an agreement entered into before a written Ministerial approval has been obtained, can be validated, the contract entered into by the parties to this suit is void and unenforceable.

It might be that what caused the Judge to adopt a wrong approach to the question of construction which arose for decision was the general

principle referred to by the Supreme Court in the case of *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor.*, [1990] 1 MLJ 356 that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.

This general principle could have no application to the present case where the statute provides to the opposite effect; namely, that while it prohibits and penalizes certain agreements or arrangements it nevertheless reveals an intention that generally they shall be valid and enforceable; the exception being where it is otherwise provided in the statute or in pursuance of any provision therein. Provisions of this sort are rare and so we are reminded of the following passage in the judgment of Gibbs ACJ in *Yango Pastoral Co. Pty. Ltd. v. First Chicago Australia Ltd.* [1978] 139 CLR 410:

> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because **it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable,** and in most cases it is sufficient to say, as has been said in many cases of authority, that the **test** is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is **a question of construction** whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.
>
> (Emphasis provided)

We had also kept in mind the provisions of s. 24 of the Contract Act (Revised - 1974), since the broad question for decision was whether the alleged agreement was unlawful by reason thereof as being an act or undertaking which was forbidden by law in that it violated a prohibitory enactment of the Legislature and that it was by reason of that void.

Section 24 of the Contracts Act provides:

> 24. The consideration or object of an agreement is lawful, unless -
>
> (a) it is forbidden by a law;
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property of another; or
> (e) the Court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The relevant principles to be distilled from various authorities which afford guidance on the interpretation of s. 24 of the Contracts Act are conveniently collected in Pollock, **Principles of Contract,** 10th Edn., p. 233, and have been applied in *Babiah v. Mohammed Abdus Subhan,* [1954] A. Hyd. 156 (F.B.), *Fakirchand v. Bensilal* [1955] A. Hyd. 28 (F.B.) and *Bhashayya v. Chinnapareddi* [1960] A.A.P. 39. These principles merit reading and are as follows:

> When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the conditions was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition were imposed; (but they) are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, e.g., the convenient collection of the revenue.

In our general survey of the authorities under s. 24 of the Contracts Act, cited in Pollock, we encountered the case of *George v. Greater Adelaide Land Development Co. Ltd.* [1929] 43 CLR 91, which shows that a statutory prohibition against an agreement need not be express so long as it is implied. In that case, s. 23 of the Town Planning and Development Act 1920 (S.A.) made it unlawful for any person to subdivide any land into allotments or to offer for sale or to sell, etc. any existing allotment except in accordance with the provisions of the statute, and the section imposed a penalty on any person acting

in contravention of that provision. A contract for the sale of certain allotments had been entered into at a time when the provisions of the statute had not been complied with though the contract was expressed to be subject to the provisions of the statute having been complied with. Indeed, subsequent to the contract, the statute was complied with. It was held that although neither the statute nor the Regulations thereunder expressly prohibited selling before issue of a certificate thereunder, the prohibition was implied from the steps to be taken by any person desiring to sell land, and so the contract was illegal and invalid for contravention of the statute and the moneys paid by the purchaser under it recoverable.

We must now embark upon a more detailed consideration of the question that arises for decision.

Before us, Counsel for the defendants had contended that the other provisions of the Act at which we should look to determine whether the contravention of s. 45(1) of the Act had resulted in the agreement being void were ss. 48(1), 54 and, in particular, subsection (11) thereof. The question which arises is whether he is correct in his contention.

In the present case, s. 45(1) expressly prohibits any person from entering into any agreement or arrangement to acquire or dispose any interest in the shares of a licensed institution of the kind defined therein without obtaining the prior written approval of the Minister of Finance. The Act goes on to provide by s. 103(1) read with the Fourth Schedule, item 59, that any person who contravenes the provisions of s. 45(1) commits an offence and shall on conviction be liable to imprisonment not exceeding five years or a fine not exceeding RM5 million or with both such imprisonment and fine.

The next question is whether the Act does more than impose a penalty or in other words, does non-compliance with its provisions render the agreement or arrangement void.

In accordance with the judgment of Lord Esher, MR in *Melliss v. Shirley Local Board*, 16 QBD 451, we have to look at the statute as a whole and consider whether it imposes a penalty merely to deter persons from entering into such a contract, or for the purposes of revenue, or whether it is intended that a contract so entered into shall be valid in Law.

It follows that the mere fact that an agreement or arrangement is in contravention of s. 45(1) of the Act, is not by itself alone enough to render the same void; to be so, there must be **some other provision in the Act, which has that effect.**

So, we asked ourselves whether there were any, and if so, what invalidating provisions in the Act, which could fairly be considered as falling within the meaning and ambit of the opening words of s. 125 - "Except as otherwise provided in this Act or in pursuance of any provision of this Act ..."

Our attention was directed by Counsel for the defendants to s. 48(1) of the Act which provides:

> 48.(1). Subject to subsection (2), nothing contained in ss. 45, 46 and 47 shall render invalid any acquisition or disposal of any interest in the shares of a licensed institution by any person where the same had been completed, or any holding of any such interest in shares which existed, at any time before the effective date and was lawful and valid immediately before such date.

By s. 2 of the Act, unless the context otherwise requires, "effective date" means the relevant date or dates, as the case may be, notified by the Minister under s. 1 which in turn provides:

> 1. This Act may be cited as the Banking and Financial Institutions Act 1989, and shall come into force on such date as the Minister may, by notification in the Gazette, appoint, and the Minister may appoint different dates for the coming into force of -
>
> (a) different provisions of this Act; or
> (b) all or different provisions of this Act in respect of different classes or categories of institutions.

By Gazette Notification N. (B) No. 490, dated 28 September 1989, the Minister had appointed 1 October 1989 as the date on which all the provisions of the Act shall come into force, except in respect of scheduled institutions; and he had appointed 1 January 1990, as the date on which all provisions of the Act shall come into force in respect of scheduled institutions.

By s. 2, "scheduled institution" means a person which carries on a scheduled business but does not include a co-operative society, a statutory body, a local authority, a licensed bank, a licensed finance company, or a licensed merchant bank, carrying on a scheduled business.

By s. 2, "scheduled business" means any business specified in the Third Schedule which provides:

1. Building credit business.
2. Credit token business.
3. Development finance business.
4. Factoring business.
5. Leasing business.

Neither defendant being a person which carried on a scheduled business, the applicable effective date, for purposes of the present case, would be 1 October 1989, and as the alleged agreement in this case had been entered into **after** that date, that is to say, on 14 December 1989, it was not open to the plaintiff to rely on the saving provisions of s. 48(1). But, that is not all, because by providing a saving provision in respect of acquisitions or disposals or holdings before the effective date, s. 48(1) necessarily implies that in respect of such transactions as are carried out on or after the effective date which offend s. 45, the same would thereby be rendered illegal and invalid.

A consideration of s. 54(1) and, in particular, s. 54(11), points to the same conclusion.

Section 54(1)(a) authorises the Bank upon being satisfied that any person has contravened, *inter alia*, s. 45, to make a preliminary order in writing imposing any one or more of four prohibitions or restrictions in respect of shares which are the subject of the contravention. The preliminary order shall be binding, *inter alia*, on the defaulting person (s. 54(3)). Any person holding any shares subject to the preliminary order, shall within 7 days or such longer period as the Bank may allow, surrender such shares to the Bank (s. 54(4)). A defaulting person against whom a preliminary order has been made is given a right to make representation to the Bank, for a revocation or modification of the preliminary order (s. 54(6)). In such event, the Bank either accedes to the representation (s. 54(1)(7)) or dismisses it by confirming the preliminary order whereupon it may dispose of the shares (s. 54(8)). And, most importantly, s. 54(11) provides:

> 54(11). Any transaction, including any agreement or arrangement in relation to any shares, or interest in shares; or security, which is in contravention of any preliminary order, or of any order confirmed under subsection (7), or of any instructions or directions given by the Bank under subsection (10), shall be void and of no effect.

In these circumstances, we were amply satisfied that s. 48(1) and s. 54(1) and (11), are invalidating provisions in the Act, which can fairly be considered, as falling within the meaning and ambit of the exception clause in s. 45(1) which provides:

> Except as otherwise provided in this Act, or in pursuance of any provision of this Act ...

We were therefore driven to the inevitable conclusion that the alleged agreement of 14 December 1989, had contravened s. 45(1) of the Act, and being an act or undertaking which was forbidden by law in that it violated a prohibitory enactment of the Legislature it was by reason of s. 24 of the Contracts Act void.

The Judge was therefore right in answering the preliminary questions of Law in the way she did.

In the result, we dismissed the appeal with costs here and below. But the suit being still pending, we proceeded, in consequence, to dismiss it. Lastly, we ordered that the deposit paid into Court by way of security for the costs of the appeal should be paid to the defendants to account of their taxed costs.